

EQUALITY RIGHTS AND DEMOCRATIC TRANSITION

Study of cases in South Africa's Equality Courts

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Abbreviations

ADR	Alternative Dispute Resolution
CALS	Centre for Applied Legal Studies
CSVR	Centre for the Study of Violence and Reconciliation
DOJCD	Department of Justice and Constitutional Development
IDASA	The Institute for Democracy in South Africa
NGO	Non Governmental Organization
SAHRC	South African Human Rights Commission
SAIRR	South African Institute of Race Relations
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
TfR	Tidsskrift for Rettsvitenskap
THRHR	Tydskrif vir Hedendaagse Romeins Hollandse Reg.
TRC	Truth and Reconciliation Commission

1 Introduction

1.1 Subject matter

The Constitution of the new South African state is based on the right to equality and justice.¹ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 establishes a legal tool to implement the constitutional prohibition of discrimination.² A specially trained judiciary is created to give effect to its provisions, dealing with disputes rooted in unfair discrimination, hate speech or harassment. The main theme of this paper is the practical function and justification of the “Equality Courts” implementation of the substantive right to equality in South Africa.

1.2 Background

South Africa’s transition to democracy has provided institutions marked by a democratic and legitimate order based on the principles of equality and human dignity. This is in sharp contrast with the previous institutionalised apartheid system. Although significant progress has been made, relations between individuals and groups are still marked by the extreme inequality which is entrenched in social structures, practices and attitudes.³ Structures of systemic discrimination are deeply rooted in the society, which prevents people from enjoying full benefits and opportunities of the society. Democratic rule based on equality has not as such been adopted successfully by citizens yet.⁴ The citizens are not fully benefiting from the newly established legal order based on equality and rule of law.

¹ The Constitution of the Republic of South Africa: Act 108 of 1996 section 1. See appendix A.

² See appendix B. Hereafter: “Equality Act”.

³ Equality Act: Preamble.

⁴ Mattes, Robert. *South Africa: Democracy without the People?* In: Journal of Democracy. Vol. 13 (2002), p. 22-35 at p. 23.

“The crucial requirement of the South African transition is the need to reconstruct society and to abolish the horrendous inequalities which were produced by the apartheid system.”⁵

With reference to Asmal; the significant challenge for South Africa is to *reconstruct the society* and *abolish inequalities*. The Equality Act seeks to “facilitate the transition to a democratic society that is united in its diversity and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom”.⁶ It is intended to be a “piece of social legislation”, firstly because it seeks to protect the individual from disadvantages created by the previous regime. Secondly it seeks to take positive measures to educate and transform people in the society along the lines of national agenda of democracy, as part of a commitment to international obligations to eliminate discrimination.⁷ The Equality Act therefore addresses both protection of individuals and democratic transition in its implementation of substantive equality through the Equality Courts. Accordingly, the Equality Act is a direct attempt to overcome the deep structures of systemic inequalities and roots of discrimination in South Africa.

As the Equality Courts have been in operation only since 2003, there is little systematic research on how they function. As a student interested in democratization and equality rights, I wanted to explore the potential of the Equality Courts in protecting, promoting and reconstructing equality on an individual and on a societal level in South Africa.

In the process of transformation, equality as a value and a right is crucial. The value of equality gives substance to the Constitution and is the directing principle of democracy.⁸

⁵ Asmal, Kader. *Truth, Reconciliation and Justice*. In: The Modern Law Review. Vol. 63 (2000) p. 1-24 at p. 11.

⁶ DOJCD. (2003) *Equality Act Booklet*. [Cited 20.04.2006] p. 2. Available at: http://www.doj.gov.za/2004dojsite/eqact/eqc_other%20docs.htm

⁷ Equality Act section 2c(e),h); Gutto, Shadrack B. O. *Equality and Non-Discrimination in South Africa: the Political Economy of Law and Law making*. (Claremont 2001), p. 7.

⁸ Constitution section 7(1).

Equality as a right provides the means of implementing substantive equality, which may be understood as equality in social and economic life.⁹ This entitles people to claim equality as a truth in their life.¹⁰

The South African court system is mainly based on the adversarial system of litigation. Scholars have criticised the adversarial system of being adhered to formalism and the legalistic approach of justice, of not being user-friendly and therefore denying people access to courts. The model of traditional adjudication has been described this way:

“Ours is an adversarial system involving two parties fighting it out before a neutral referee who, at the end of the case declares a winner (and then obviously also a loser). This adversarial system of litigation is based upon elements of persuasion, hierarchy, competition and binary results (win-lose).”¹¹

Giving everyone a chance to have their case tried before the courts is a necessary precondition to enforce equality rights.¹² In South Africa there is a tremendous challenge to diminish and remove the systemic structures which deny access to legal services for all citizens. This is not only in terms of substantive law which under apartheid was institutionalized by the oppressors, yet also in terms of the structure and procedural requirements of the courts which upheld inaccessibility to the courts for ordinary citizens.¹³

⁹*Introduction to the Promotion of Equality and Prevention of Unfair discrimination Act: Act 4 of 2000*. Eds. Cathi Albertyn, Beth Goldblatt and Chris Roederer for CALS (Johannesburg 2001), p.1; See also Constitution section 9.

¹⁰ Albertyn, Cathi. *Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence of equality*. Cathi Albertyn and Beth Goldblatt. In: SAJHR Vol. 14 (1998), p. 248-276 at p. 249

¹¹ Bohler-Müller, Narnia. *The Equality Courts as a vehicle for legal transformation – A few practical suggestions*. Narnia Bohler-Müller and Mark Tait. In: Obiter Vol. 21 (2000) p. 406-415 at p. 411.

¹² Gutto (2001:204).

¹³ Grant, Brenda. *Peoples Courts?* Brenda Grant and Pamela-Jane Schwikkard. In: SAJHR Volume 7 (1991), p. 304-316 at p. 305.

The Equality Courts' procedure differs from the adversarial system of litigation. The point of interest in this study is how this new system of litigation may provide a more just and appropriate system of litigation to sustain equality rights. The concept of justice is ambiguous. It has been submitted that justice is an "ideal to which law ought to conform in order to be good law".¹⁴ This addresses an overall ideal of justice in substantive terms.¹⁵ Scholars concerned with justice for all people have emphasized various procedural and institutional factors which may contribute to a more just law in substance. These are based on factors regarding *access* to law and justice, with institutions providing a fair procedure and a just outcome to the parties. Accessibility, participation, informality and flexibility are seen as important indicators of a fair procedure. These are as such not ultimate goals of justice, but are seen as means in order to create a more responsive and user friendly form of justice.¹⁶

1.3 Scope of the paper

The main question of the thesis is:

whether, and to what extent the Equality Courts are governed by a just and appropriate procedure implementing the substantive right to equality.

How the tension between the protection of individual equality rights and promotion of equality is handled as a means of social transformation is the overall quest. Two questions are thus pointed out:

1. Whether, and to what extent is the Equality Courts' procedure appropriate and justifiable from the perspective of the parties?

¹⁴ Dlamini, CRM. *Law and justice: A South African perspective*. In: De Jure (1987), p. 270-284 at p. 272.

¹⁵ More on philosophical reflections between law, justice and morality op. cit. p.271-274.

¹⁶ Gundersen, Aase. *Popular Justice in Mozambique: Between State Law and Folk Law*. In: Social & Legal studies: An International Journal. Vol. 1, Number 2 (1992), p. 257-282 at p. 263.

2. Whether, and to what extent is the Equality Courts' use of remedies appropriate and justifiable from the perspective of the parties?

The thesis will explore how institutional and procedural features of the Equality Courts in practice respond to the quest for individual and social justice. The research for this is based on a field-study conducted in the Equality Court in Durban, Kwa-Zulu Natal. Observation and case-studies scrutinize some of the institutional and procedural features of the courts. This reveals whether the design in practice is fair and justifiable to the disputes and their actors.

The relationship between the procedure in practice and substantive justice is an ambiguous question which leads us to ask; *more just for whom?*¹⁷ The measures applied in practice illustrate how justice may be reached by different means.

I therefore aim to reveal how Durban Equality Court's application of remedies may sustain different types of justice; retributive, reparative or restorative justice. These are overall aims whereas the means of implementing a norm seeks to achieve justice either through punitive sanctions, repairing damages or restoring a broken relationship between a victim and an offender. For a nation in transition after years with oppression, the need to reconstruct the nation as a whole through restorative processes becomes crucial. In the South African transition, the emphasis has been on *forgiveness and reconciliation*.¹⁸

Out of the research conducted emerges a tension of balancing between individual and social justice. The study points out whether the means of reaching justice is justifiable from the perspective of the individuals. There is a crucial need of knowing more about the practical consequences of the applied remedies in communities and at the individual level.

¹⁷ Ibid. p.264.

¹⁸ Wilson, Richard A. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge 2001), p. 9-13.

In dealing with the court's practical function in the society I do not intend to give an in-depth analysis of the Equality Act on the basis of South African legal methodology. This implies that the tension between the substantive right to equality in the Equality Act and constitutional or international human rights norms are not dealt with.¹⁹ The study is furthermore influenced by the material collected in field. This demarcates the burden of proof and evidentiary session of the proceedings. In addition, the specific responsibility and duty of the state to promote equality as stated in chapter 5 of the Equality Act and appeals is left out.

1.4 Methodology and sources

“Grounded theory” constitutes the methodological basis for this socio-legal study. The research is based on a qualitative field study in combination with written sources. The intention is to analyse the aims and goals of the Equality Courts in the light of practice of Durban Equality Court.

Grounded theory is characterized by a “continuous dialogue and interaction, as the research proceeds, between the initial theory and the empirical data collected”.²⁰ The aim of the method is to reach a deeper understanding so that one may draw new lines of theories that add something to previous comprehension. Use of grounded theory helps a researcher to move from initial questions, opening up the mind, in order to answer new questions, which leads to concept building. This requires an ongoing process of reviewing findings and comparing them to other data with logic and reflections between general theories and particulars of the field study. The method is often used in socio-legal science. Through a process of combining logical thought and empirical data one may be able to produce

¹⁹ More on the tension between prohibition of hate speech and the constitutional freedom of expression may be found in: Teichner, Shaun. *The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, the Bad and the Ugly*. In: SAJHR Vol. 19 (2003), p. 349-381.

²⁰ *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law*. Bentzon, Agnete Weis [et al]. (Oslo 1998), p. 81.

appropriate theories or hypotheses which are considered to be reasonable explanations of the findings.²¹

1.4.1 Field study

The field study was initiated in the offices of the Equality Court in Durban, Kwa-Zulu Natal during five days of November and December 2005. The research enables the generation of a grounded hypothesis and raises new questions regarding the functioning of the courts.

The material consists of qualitative observations made in the administration and during one “directions hearing”, an interview with the equality clerk and dialogue with the presiding officer in addition to notes from reviewing cases filed in the administration. The aim of the study was to obtain a deeper insight and understanding of the courts’ function in practice. This study may be characterized as a qualitative research. I chose to initiate this in an informal manner, so that I would as far as possible not leave out any relevant information.

Notes from cases

All documents of matters brought and/or settled by Durban Equality Court were filed in the offices. The files constituted information about each matter, from the initiating of a complaint, affidavits, letters to parties, letters of apology and possible orders or rulings by the presiding officer. The material does not show any data about either costs or time when approaching the court.

The complaints were hand-written and some were difficult to understand due to complainants’ low degree of English skills. Despite this, the notes provided valuable information about reasons of complaint, background of the complainant, the alleged rights infringed, etc. My actions in this regard were writing down short hand notices from these files, which constituted 33 of the 88 cases brought to the court in 2005. Complaints in

²¹ Ibid. p. 175-188

isiZulu were left out. The data are though not confirmed by any occasion, which must be taken into account due to their precision and validity.

Observations

The time spent in court involved observations made in the administration and during a “directions hearing”. The observations in the administration were carried out whilst watching and recording impressions of the environment in the offices, how officials were behaving and visitors were treated, what kind of people were apparent, the activities conducted, etc. This resulted in many important impressions due to the practical functioning of the court. It would have been preferable to have stayed longer, observing more hearings between different types of parties, in order to increase the insight even more. When writing down information from the files in court, I had the opportunity to sit in shared office space with officials of the court. This resulted in impressions about the general situation in the administration. My role was passive as I was not involved in any of the events taking place in the administration.

The passive observations initiated during the “directions hearing” refer to impressions during the session, both in physical/psychological regard but first of all of the conduct of the participants in court. This is based on both physical and oral performance, proceedings in general and impressions of “climate” in court.

Interview

Most of the time, the equality clerk was available for questions, discussions and talks about the Equality Courts. In addition, one arranged interview took place. This was characterized by an open and informal approach, more like a dialogue. A magistrate who welcomed me to the court was hardly available; still some informal discussions were initiated.

1.4.2 Written sources

Legal sources

To describe and analyse the legal framework for the Equality Courts several sources have been consulted. This involves primarily the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and its Regulations. Additionally, the Constitution of South Africa is of utmost importance, as it has supremacy over the Equality Act and founds the principle and right to equality. The cases of the Constitutional Court in South Africa are directing the right to equality and are as such valuable to highlight and explain the formal legal content of the provisions of the Equality Act. The international Convention on the Elimination of All Forms of Racial Discrimination has been used as background information as it addresses the international obligation of South Africa to prevent discrimination.

Literature and reports

Literature from various scholars has been consulted; there is a vast body of literature dealing with the concepts of dispute settlement, anti-discrimination and transitional justice. Literature about the Equality Courts has been found in some books, but mostly in articles in journals and in the media. The literature about the Equality Courts in journals and books is mainly of a theoretical nature. There are so far only two smaller empirical studies published with information of *how* the Equality Courts actually have been working.

The “Bench book for Equality Courts”, published by the Judicial Service Commission and Magistrates Commission for the officers in court is very informative as to how to balance ideals and intentions into practice. The department has also published an informative booklet to promote of the court. The “Equality Legislation Implementation Project” and the “Equality Review Committee” have published reports on the implementation of the act; but these are more background literature in the understanding of the substantive provisions of the act. The South African Law Commission (SALC) has published an informative issue paper on Alternative Dispute Resolution (ADR) which is of interest to understand the political incitement of ADR in South Africa.

Non governmental organizations (NGOs) in South Africa have contributed with some reports about the Equality Courts. The Centre for the Study of Violence and Reconciliation (CSVr) and Institute for Democracy in South Africa (IDASA) and Centre for Applied Legal Studies (CALS) have been valuable sources, both with reports and other publications. In particular CALS has contributed with a thorough overview of the Equality Act.

1.5 Presentation outline

Chapter 2 provides an overview of the legal framework for the Equality Courts. This involves both substantive matters and the procedural framework of the Equality Act.

Chapter 3 presents the parameters used to analyze the courts.

Chapter 4 introduces and presents the cases and characteristics of the users and the type of disputes.

Chapter 5 deals with the accessibility of the court and discusses whether the procedure is appropriate and fair. This involves both analysis of the fairness of the proceedings, and access to a fair procedural body, in addition to analysis of the access to justice during procedure.

Chapter 6 deals with the accessibility to outcome. This involves an analysis of remedies used by the courts with a view to how individual and social justice is balanced. This involves a discussion of the tension between individual protection of equality rights and the societal need for transformation.

Chapter 7 finishes with concluding remarks.

2 The legal framework for analysis

2.1 Substantive equality provisions

Chapter 2 of the Equality Act envisages the provisions of “prevention, prohibition and elimination of unfair discrimination, hate speech and harassment”.

2.1.1 Discrimination

“Discrimination” is defined in section 1 (viii), as:

“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly- (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;”

This means that differential treatment in itself does not necessarily constitute discrimination: only where the differential treatment causes harm or prejudice will it not be justifiable. Some examples of positive acts which may constitute discrimination are refusal of accommodation, discriminatory requirements for admission to a club, or the refusal of emergency medical treatment.²² Failure to act, inter alia where facilities are not provided to assist disabled persons using a public building, falls under the same prohibition. The meaning of discrimination is, however, not limited to individual acts but includes broader social and structural causes of discrimination whereas conduct indicates a policy, law, rule, practice etc.²³

²² *Bench book for Equality Courts*. Ed.: Judicial Service Commission and Magistrates Commission (Pretoria 2001), p. 69.

²³ Introduction (2001:32-34).

The Equality Courts' jurisprudence must be in accordance with the constitutional protection against discrimination and hence must be rooted in the democratic values and substantive rights of the Constitution. Constitutional jurisprudence is therefore the most important source in understanding the enquiry of unfairness in the Equality Act.²⁴

Different forms of discrimination may be illustrated with the Constitutional Court's case of *The City Council of Pretoria v Walker*.²⁵ One form of discrimination is where there is a direct link between a prohibited ground and discrimination. As an example, where a person is denied medical aid because she or he is HIV positive a direct link will be established. It is not necessary to show an intention to discriminate, as the relationship between the ground and the discriminatory act or omission is decisive.²⁶

To identify indirect discrimination, one has to analyze seemingly innocent conduct or neutral acts, or requirements where the conduct has harmful or prejudicial effects. An admissions practice that appears to be neutral, but has the effect of disproportionately excluding black children will therefore constitute indirect race discrimination.²⁷

In terms of section 14 of the Equality Act, discrimination is only unlawful when it is regarded as "unfair". The provision therefore clarifies that it "is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons". Accordingly, it is submitted that section 14(2) emphasizes factors relating to the *impact* of the discrimination on the complainant, as well as those relating to the *purpose* of the alleged discrimination balanced by the reasons and justifications of the respondent.²⁸

²⁴ Ibid. p. 37.

²⁵ Ibid., p. 32-34, with reference to *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at para. 43.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Bench Book (2001:71-72).

Three different cases from the Constitutional Court are frequently referred to in order to illustrate the decision of unfairness.²⁹ The three-staged enquiry firstly asks whether there has been any act or omission that constitutes discrimination on one of the prohibited grounds.³⁰

If discrimination is proven, -is the discrimination unfair? The Constitutional Court has stated that the issue of unfairness is determined primarily by the impact of the discriminatory act on the complainant and his or her group rather than the justifications or defenses of the respondent.³¹ At this stage, the Constitutional Court looks at whether the complainant is a member of a group that traditionally has suffered from disadvantages. Discrimination will in these cases be more likely to constitute unfair discrimination because members of more vulnerable groups have a higher expectation of being exposed to unfair discrimination.³²

If the discrimination is unfair and results from a law of general applications, the Constitutional Court asks finally if the limitation of the right to equality is *reasonable and justifiable* in a democratic society based on human dignity, freedom and equality. This last test refers to the section 36 of the Constitution which involves balancing values, assessing proportionality and interests. The emphasis is on the purpose of, and reasons and justifications for the law or conduct, considered in the context of the democratic values

²⁹ Also called the “Harksen-test”. See Introduction (2001:37-40); Albertyn, Cathi. *Facing the Challenge of Transformation: The difficulties in the development of an indigenous jurisprudence of equality*. In: SAJHR Vol. 14 (1998) p. 248-274; Vos, Pierre de. *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court*. In: THRHR Vol. 63 (2000), p. 62-75 at p. 70-75. With reference to: President of the Republic of South Africa & another v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); Harksen v Lane NO & others 1998 (1) SA 300(CC); 1997 (11) BCLR 1489 (CC); National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others 2000 (1) BCLR 39 (CC); 1999 (1) SA 6 (CC)

³⁰ See section 2.1.4; See also Constitution section 9(3).

³¹ Introduction (2001: 37-40), with reference to: *Hugo* (1997:37, 43), *Harksen* (1998:51) *National Coalition* (1999:19).

³² Introduction (2001:38), with reference to: *Hugo* (1997:112).

entrenched in the Constitution. An important limitation, however, is that the third test does not apply to discrimination that does *not* derive from a “law of general application”.³³

2.1.2 Hate speech

Section 10 of the Equality Act prohibits “hate speech”, in which the provision seeks to prevent speech that leads to discrimination or the impairment of dignity, freedom and security of a person.

The wording in section 10 prohibits speech which can;

“reasonably be construed to demonstrate a clear intention to be hurtful, be harmful or to incite harm, to promote or propagate hatred”.

South Africa’s Constitution already protects freedom of expression, yet this does not include all forms of expressions.³⁴ The provision in the Equality Act therefore requires a balancing between freedom of expression and the prohibition of hate speech.³⁵

The prohibition of hate speech refers expressly to “words” and not to other non-verbal forms of communication. This means that pictures will fall outside the Equality Courts’ jurisdiction. However “words” may appear in different forms - “publish, propagate, advocate or communicate words” may constitute prohibited forms of hate speech. There is no requirement to prove intention behind the “words”, or that the words rise to the level of hatred. The test asks whether a reasonable person could understand the words “as demonstrating a clear intention” to be hurtful, harmful, promote or propagate hatred.³⁶

³³ Introduction (2001:41).

³⁴ Constitution section 16.

³⁵ This will not be elaborated, due to previous demarcations.

³⁶ Bench Book (2001:73-74).

2.1.3 Harassment

The concept of harassment is defined in South African legislation in section 1(1)xiii) of the Equality Act.³⁷ The emphasis in the prohibited conduct is on the *experience* of the person being harassed rather than the intention of the harasser. The conduct can be in a variety of forms, such as verbal, physical or other means. The provision sets out a requirement that the conduct is “persistent”, which means that one single act would normally not be an infringement of the prohibition. Alternatively to a number of persistent acts, one single and *serious* act may constitute harassment.³⁸

The conduct(s) which constitute harassment need(s) to be related to one of the prohibited grounds in the Equality Act.³⁹ This means that the conduct must be linked to a person’s connection to a group rather than individualized aversion.⁴⁰

2.1.4 Prohibited grounds

The Equality Act differentiates between discrimination on listed and non-listed grounds, wherein race, gender and disability have been given special attention.⁴¹ Seventeen listed grounds are envisaged to secure a broad scope of application of the non-discrimination clauses.⁴² These are based in constitutional, international and historical circumstances.⁴³

³⁷ See Equality Act section 1(1)xiii).

³⁸ Introduction (2001:98-99).

³⁹ Equality Act section 1(1)xiii); see section 2.1.4.

⁴⁰ Introduction (2001:98-99).

⁴¹ Equality Act sections 7, 8, 9.

⁴² Equality Act section 1(1)xxii); “prohibited’ grounds are: a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”; Introduction (2001:54).

⁴³ Gutto (2001:150-153).

The listed grounds are identical to those in section 9(3) of the Constitution. In paragraph 49 of the case of *Harksen v Lane NO & others*, the Constitutional Court describes the listed grounds as follows:

“...What the specified grounds have in common is that they have been used...to categorise, marginalise, and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted”.⁴⁴

The potential to impair “human dignity” is envisaged in the Constitutional Court’s jurisprudence to characterise prohibited grounds of discrimination. Rather than use human dignity as a measurement of prohibited grounds, the Equality Act put emphasis on the *result* of the discrimination.⁴⁵

Non-listed grounds are prohibited if discrimination on those grounds results in either systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a listed ground. Any of these three requirements may be used as a means of proving that discrimination on non-listed grounds exists.⁴⁶

Section 34 of the Equality Act envisages a “directive principle” on grounds which should be given special attention in the application of the substantive provisions. These regard HIV/AIDS, nationality, socio-economic status, and family responsibility and status.

⁴⁴ *Harksen v Lane NO & others* 1998 (1) SA 300(CC). [Cited 20.04.2006] at para. 49. Available at: www.constitutionalcourt.org.za/Archimages/1610.PDF

⁴⁵ Introduction (2001:53-55).

⁴⁶ Equality Act section 1(1)(xxii)b).

2.2 Equality Courts' officers

The Equality Courts are staffed by personnel whose backgrounds and training must be dedicated for the implementation of the Equality Act.

2.2.1 The presiding officer

The judge or magistrate who is appointed as presiding officer in the Equality Court must meet the conditions as set out in section 31(1)a) of the Equality Act. A presiding officer may only be designated if "his or her training, experience, expertise and suitability in the field of equality and human rights" qualifies.

The emphasis on special skills and capacities reflects the complexity which the discriminatory conflicts represent. The substantive and procedural features of the Equality Act necessitate training in order to ensure its effective and just implementation.⁴⁷ The training therefore covers different areas: social context and diversity training, substance of the Equality Act and the Employment Equity Act, knowledge about alternative forum for dealing with equality disputes and procedures and regulations of the Equality Act. Furthermore, in addition to understanding of the Constitution and Constitutional cases, international and comparative law is also addressed.⁴⁸

2.2.2 The equality clerk

The clerks of the Equality Courts are appointed under the terms of section 17 of the Equality Act. Their responsibility is upgraded compared to clerks of other courts, involving not only the court's administrative functions.⁴⁹ It involves making substantive assessments

⁴⁷ Equality Act section 4(1)e).

⁴⁸ Lane, Philippa. (2005) *South Africa's Equality Courts: An Early Assessment*. CSVR. [Viewed 03.02.2006] p. 10-11. Available at www.csvr.org.za/papers/paprctp5.htm

⁴⁹ Ibid.; Regulations relating to the Promotion of Equality and Prevention of Discrimination Act, 2000. (2004). [Viewed 03.04.2006] section 5(a)-(d). Available at: www.doj.gov.za/2004dojsite/eqact/legislation/eqc_1final_reg_eng.pdf

of the complaint and an initial determination of whether the case should come before the Equality Court or, alternatively, to another appropriate forum. In any case the presiding officer has the final decision of referral.⁵⁰

The clerks are the main point of public contact between the complainant, respondent and the presiding officer. The special training required increases the potential for successful assistance to the public.⁵¹ Training in social awareness and the substance of the Equality Act is necessary in order to assist inter alia uneducated complainants in completing documents, explaining rights and the possibilities of legal aid, as well as processes and remedies available from the court and other forums.⁵²

2.3 Equality Courts' procedure

2.3.1 Jurisdiction

Section 16 of the Equality Act provides for Equality Courts within the jurisdiction of every magistrate's court and every High Court in South Africa. Equality Courts have jurisdiction to deal with complaints against private and legal persons in addition to the state.⁵³ In terms of section 19 of the Equality Act, the jurisdiction of the Equality Courts follows the provisions of the Magistrate's Court Act and the Supreme Court Act.⁵⁴ The Equality Courts have, however, a monetary and remedial jurisdiction which exceeds that of the magistrate's Court.⁵⁵

⁵⁰ Lane (2005:10-11); Equality Act section 20(3).

⁵¹ Lane (2005:10-11).

⁵² Regulations section 5(f).

⁵³ Equality Act sections 5(1).

⁵⁴ Equality Act section 19(1) with reference to Act 32 of 1944 and Act 59 of 1959.

⁵⁵ Introduction (2001:18-19).

2.3.2 The initiating of a complaint

Any person wishing to institute proceedings under the Equality Act must notify the equality clerk of the intention to do so. The notification must be in the prescribed manner whereby a special form must be filled out.⁵⁶ The form requires detailed information of the complaint, the relief sought and the personal consequences of the complaint as well as reactions of any other institutions the complainant has approached.⁵⁷

The clerk must notify the respondent within seven days, and invite him or her to submit information to the Court within ten days. The matter must be referred to a presiding officer within ten days after such response, who must within a limit of seven days reach a decision whether the matter should be heard in the court or be referred to an alternative forum.⁵⁸ The decision is made on factors as “personal circumstances”, “physical accessibility”, “needs and wishes of the parties”, “the nature of the intended proceedings”, “the outcome of the proceedings” and “the views of the appropriate functionary at any contemplated alternative forum”.⁵⁹ All relevant circumstances must be considered when designating another institution, body, tribunal or court as more appropriate to deal with the specific matter.⁶⁰

If the presiding officer determines that the matter should be heard in the Equality Court, a “directions hearing” must be held, where the complainant, the respondent and the presiding officer meets in order to solve issues relating to the initiating of proceedings and other administrative and procedural matters.⁶¹

⁵⁶ Equality Act section 20(2); Regulations section 6(1).

⁵⁷ See appendix C.

⁵⁸ Regulations section 6 (1)-(5).

⁵⁹ Equality Act section 20(4).

⁶⁰ Ibid.; Introduction to the Equality Act (2001:25-26): Alternative forum may be the South African Human Rights Commission, the Commission for Gender Equality, the Independent Electoral Commission, the Public Protector, the Pan South African Language Board, the National Youth Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

⁶¹ Regulations section 6(5), 10(5)a).

2.3.3 The hearing. Guiding principles.

Participation by the parties

Section 4 of the Equality Act read with Regulation section 10(1) requires that the hearing must be conducted in an “expeditious and informal manner which facilitates and promotes participation by the parties”. This is further emphasised in section 10(3) of the Regulations which requires that “the proceedings should, where possible and appropriate, be conducted in an environment conducive to participation by the parties”. These principles provide for a more “open court” which is less formal and more facilitative to participation by the parties

Information and investigation

The presiding officer has an obligation to inform unrepresented parties of the right to have a legal representative of his/her own choice, the system of application of legal aid, institutions which he/she may approach for legal assistance, and to also *explain* the contents and implications of any direction or order.⁶² The contribution of the presiding officer to inform the parties thus intends a setting where the necessity of judicial skills or representation should not be required.

The legal system in South Africa is adversarial in nature. However, the role of the presiding officer establishes a link to the inquisitorial model. The sitting officer in the Equality Court has an extensive authority to play an investigating role, whereas he or she must:

“ascertain the relevant facts about the complaint and to that end he or she may question any party who elects to give evidence or who is called as a witness at any stage of the proceedings”.⁶³

This is in great contrast to the adversarial system, thus the court is challenged to balance traditional principles and procedures with those introduced by the Equality Act.⁶⁴

⁶² Regulations section 10(5)e).

⁶³ Regulations section 10(10)b).

⁶⁴ Bench Book (2001:110).

Access to justice

Section 4 of the Equality Act requires that the proceedings ensure that everyone has “access to justice”. This refers to the concept of “equality of arms” which applies to criminal as well as civil matters in South Africa. The Equality Act envisages a role for the presiding officer in ensuring this, especially for an unrepresented accused. The presiding officer should avoid any miscarriages of justice where there is unequal representation between parties, and is thus given the authority to contribute to even out an imbalance between the parties in addition to the authority of intervention.⁶⁵

Use of measures

The guiding principles furthermore stress the use of “corrective and restorative measures in conjunction with measures of a deterrent nature”.⁶⁶ This will be explained below in section 2.3.4.

Specialised officers

The necessity of specialised officers is envisaged through a principle of “development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof”.⁶⁷ See above section 2.2.

2.3.4 Measures available

A list of remedies available to the Equality Courts is set out in the Equality Act section 21(2). A broad range of remedies is envisaged, in accordance with the guiding principles.⁶⁸ The various types of remedies aim that the court may play an active role in ensuring that appropriate measures are taken to eradicate discrimination: educating the offender instead

⁶⁵ Ibid.

⁶⁶ Equality Act section 4 (1)d).

⁶⁷ Equality Act section 4 (1)e).

⁶⁸ Equality Act section 4 (1)d), see section 2.3.3.

of giving punitive sanctions.⁶⁹ In the Bench Book for the Equality Courts, this is phrased as follows;

“The court may order that opportunities which have been denied to the complainant are made available to him or her, that special measures are taken to address unfair discrimination, hate speech or harassment; that the guilty party undergoes an audit of particular policies and practices; that a regular progress report is submitted; that the respondent reasonably accommodates a group or class of persons; or that an apology be made”.⁷⁰

⁶⁹ Bench Book (2001:139).

⁷⁰ Ibid.

3 The complaint based model as a means to implement the substantive right to equality

3.1 The framework for analysis

As elaborated above, the Equality Act provides a legal and an institutional framework aiming to protect and promote the substantive right to equality. The “Guiding principles” in the Equality Act provide a clear intention of greater access to justice and less formalism in handling disputes under the act, all through a specialized procedure.⁷¹ In this thesis, a set of parameters is given for the purpose of analyzing the Equality Courts.

The parameters are generated by legal scholars, adjusted by the material of the research conducted.⁷² The parameters will be dealt with mainly in two components, access to process and access to outcome.

The term “access” is understood in its widest meaning. It is related to the question of simplifying laws: from making them known and better understood, to criteria for the recruitment and training of judges and role players in general. Furthermore, access is related to the question of the functioning and procedure of the courts.⁷³ Within these two main components, various factors which contribute to the analysis of the court will be taken

⁷¹ See section 2.3.3.

⁷² See Abel, Richard L. *A comparative theory of dispute institutions in society*. In: Law and Society Review Vol. 8 (1974), p. 217-304; *The politics of informal justice Volume 2 Comparative Studies*. Ed. Richard L. Abel. (New York 1982); Thomsen, Ellen Heiberg. *Mediating Women’s Rights in South Africa: A case study*. (Oslo 2000) (Working papers in women’s law no. 50); Sachs, Albie. *Liberating the Law: Creating Popular Justice in Mozambique*. Albie Sachs and Gita Honwana Welch. (London and New Jersey 1990); Gundersen (1992).

⁷³ Sachs and Welch (1990:46).

into consideration. In the following a short explanation and reasons for the parameters will be dealt with.

3.1.1 Introducing the cases

Substantive matters

The cases require a short introduction to their themes and types of conflicts in order to illustrate what problems they are related to. An illustration of legal matters will be facilitated, so as to understand what the disputes involve. The court's sensitivity to both legal and non-legal matters will be referred to.

Between whom?

The introduction to the parties is of interest to establish a picture of the court's users. The surrounding environment, involving where and between whom the conflicts appear sheds light on the substantive matters which the Equality Courts deals with. This is of interest later in the thesis in order to challenge the appropriateness of the courts in regarding the court's use of remedies.

3.1.2 Access to process

Who has access?

The justification of the Equality Courts to a large extent depends on establishing *who* has access to court. The parameter refers to participants' socio-economic status, nationality, age, linguistic characteristics and gender. The users thus illustrate the Equality Court's accessibility. Is the court accessible to those who experience infringement of equality rights? Is the court accessible to people who traditionally have been denied access to courts? The image of this parameter may indicate what function the court intends to

perform, whether it intends to be a court for only a few or whether it procedurally sustains its motto; “Equality for all”.⁷⁴

Knowledge

The first requirement in order to access the courts is providing *knowledge* about the right to equality and the courts’ functions. Are the courts promoted among the people it aims to serve? Do people know about the courts? Formalities connected to the promotion of the court, and how to make people aware of a court’s function are referred to. Investigations and statistics of cases are found as indicators of people’s knowledge of the courts.

Location of the court

The location of the court refers to geographical, physical and social attributes. Distance to Durban Equality Court’s users may inhibit their physically traveling there, in terms of economic considerations. Unfamiliar location may hinder the promotion of the court which in turn challenges accessibility. However, visible sight of the buildings may either invite or discourage the approach of the institution. The parameter refers to the social space of the court as well, as the inner space may seem either welcoming or alien to the users.

The initiation of a complaint

The complaint-based model forms the basis of approaching the Equality Courts. Physical barriers to leave complaints or indirectly established barriers may exclude persons from accessing the courts.

The parameter therefore refers to the forms which are required in order to leave a complaint. Formulations may not be in an easily understandable language, or may be too formal and technical. Thus, the criteria may not be understandable, or indirectly have the effect that certain people are excluded. The access to a judicial body requires an understanding of *how* to access the body in the required manner.

⁷⁴ Equality Act Booklet (2003:front page).

The forms subsequently show what focus the court seeks to highlight, -is the court focused on the legal nature of the matter, or are there other considerations? Are the desires from the complainants recognized? The appropriateness, fairness and justification of the courts depend on whether procedural enforcement mechanisms show sensitivity to various aspects.

The role of the equality clerk

The work of the equality clerk is referred to because of his potential as an administrative to either promote or hinder the access to court. Not only the legal *duties* are of interest, but also how these are practiced. Administrative officials may regulate the access to the court as well as have an impact on the following matters. The parameter is therefore chosen to establish how officials contribute to or counteract accessibility and justness.

The Equality Courts' approach to litigation

The Equality Courts' approach to litigation refers to characteristics of the hearing, involving environmental, procedural and communicative features of the hearing in Durban Equality Court. Not only may the design of the hearing, but also the environment contribute to adjusting the hearing to the backgrounds of the parties. Their ability to participate may in addition to illustrate access to proceedings, in turn influencing the fairness, justification and appropriateness of the design.

The specific system of litigation must be analyzed in order to understand how or if the foundation of litigating system *in practice* may contribute to a fair balance between the parties. Flexibility, informality and communicative features are key words in this regard.

The hearing in court further refers to how the presiding officer operates as a guide, informant, investigator and judge within the specific features of the Equality Act. The approach of his/her tasks in practice may contribute or counteract a just and fair hearing.

3.1.3 Access to outcome

The parameter of access to outcome refers to the intentions behind settlement of remedies both in isolated cases and in a broader perspective.

Direct consequences of the remedies

Isolated and directly one may address the remedies to either a prevention of discrimination or a promotion of equality rights. The parameter of access to outcome therefore refers to the direct consequences of the remedies applied, and if the remedies are appropriate in the sought regard. This seeks to point out an understanding of what the Equality Act aims in the first place and furthermore, may point out an isolated justification of the remedy.

What kind of justice do the remedies sustain?

The parameter refers to different *measures* of justice; retributive, restorative and reparative justice. The application of remedy may shed light on how different remedies sustain justice. The cases will therefore be investigated in order to reveal the Equality Courts' intention behind.

The discussion may reveal whether the court in practice merely seeks to implement a protection of individual rights or serve a broader function as promoter of equality rights. The tension between these issues will be addressed below. The overall aim is to find out whether the kind of justice which the Equality Courts seeks to sustain is justifiable to the parties.

4 The application of the Equality Act. A case study.

The case material selected for the purpose of the study constitutes nearly half of the cases submitted to the Equality Court in Durban in 2005. The cases represent different types of allegations within the scope of Chapter 2 of the Equality Act, which may constitute “unfair discrimination, harassment and hate speech”.

4.1 Introducing the cases. Problems and context

4.1.1 Substantive matters

The cases involve problems related to the protection against “unfair discrimination”, “hate speech” or “harassment”, which all have legal status in terms of Chapter 2 of the Equality Act.

An illustration of hate speech is found in case 16/2005⁷⁵

A black woman complained to the Equality Court on ground of racial insult, harassment and hate speech as a white woman had told her to “go back to the township where she belonged”. The black woman had telephoned the white estate agent about a flat advertised for rent. The woman was told that the flat was not available, and allegedly forgot to say good bye after hanging up the phone. Minutes after, she received a SMS which read, “You are a rude fucking black. No thank you. No goodbye. Go back to the township where you belong”. The court heard conflicting claims from the two women, as the black woman allegedly had called her after the SMS and “mumbled something in Zulu, and I heard her say ‘fucking white’. The reply from the state agent allegedly was: “ You fucking kaffir. If you don’t want people to be rude with you, you shouldn’t be rude with them” and then hung up.

⁷⁵ See also Newman, Latoya. (06.05.2005). *Woman to pay for hate speech*. In: The Mercury. [Cited 29.03.2006] Available at <http://www.themercury.co.za/index.php?fSectionId=283&fArticleId=2510666>

The sitting officer ruled in favour of the black woman whereas the speech of “you fucking kaffir” and to “go back to the township where she belonged” was perceived as respectively “hate speech” and “unfair discrimination”.

The legal infringements deriving from provoking, profane and fallacious speech on prohibited grounds seems to be a trend in the complaints received by the court. Many of the complaints allege use of words which, told from a complainant, “made me feel less than human”.⁷⁶ The clerk in Durban Equality Court confirmed the tendency of an overwhelming number of “hate speech” allegations brought to the court.

Case 25/2005 illustrates an example of harassment:

“The neighbour’s tenant knocked at the door, and “I was called by the mothers private parts” and saying that “I feed on the worms from the toilet and that I have got AIDS. He is coming back to burn down the house which is not a proper one in any event, he said.”⁷⁷

Aids related harassment appears often among the complaints. The files show that both persons living with aids and persons without positive status of aids bring complaints of such harassment to the court. The tendency seems to be an emphasis on the legal right to protection against *harassment*, more than considering whether the status of aids, as prohibited ground, is verified.⁷⁸

Only matters which fall under the Equality Courts’ substantive jurisdiction are heard in court. Yet there is a tendency to show sensitivity not only to the legal infringements of rights but also perceiving harassment where the *grounds* are not rooted in the truth.

⁷⁶ Pahter, Sashni. (03.04.2005). *Coolie remark made me feel less than human*. In: Sunday Times. [Cited 29.03.2006] Available at <http://www.sundaytimes.co.za/Articles/TarkArticle.aspx?ID=1413465>

⁷⁷ Case 25/2005.

⁷⁸ See “Prohibited grounds”, section 2.1.4.

4.1.2 Between whom?

The tenant and the supervisor of the residences had known each other more than 35 years. Now their families were in a destructive fight with each other. The tenants wife felt discriminated and deeply humiliated as the supervisor had referred to her husband as a “bushman” and her as a “bushman’s wife”. Her husband had been punched by the supervisor, which endorsed an interim order of restraining from interfering, abusing and harassing the complainant and members of his family.⁷⁹

A specific feature in the jurisprudence of Durban Equality Court is the appearance of some kind of relationship between the parties in conflict. As the case of the *Bushman* illustrates, the hostile parties had known each other for more than 35 years. Other cases demonstrate that conflicts often derive from the way people are treated for instance when approaching accommodation, conduct between colleagues at a working place, competitive behaviour between rival firms, etc. These matters confirm that many of the parties have a relationship to each other, as family/relatives, neighbours or relations which derive from employment.⁸⁰ Accordingly it seems that many people in South Africa face challenges in how to deal with personal and social challenges.

In a survey conducted by the South African Institute of Race Relations (SAIRR), 27% of South Africans said they had trouble with the way they “were treated by others”. 14% of these felt that the problems are very serious. An interesting discovery is, however, that only 5% of these problems allegedly had a racial character and the rest was “personal, domestic, occupational and in the neighbourhood”.⁸¹ The survey therefore illustrates that many South Africans experience inter-relational problems, and that these are not merely racially based.

⁷⁹ Case 43/2005: the *Bushman*.

⁸⁰ See also cases 25/2005; 28/2005; 33/2005; 37/2005; 39/2005.

⁸¹ SAIRR. (23.08.2001). *Unemployment and crime are bigger problems than racism*. [Viewed 29.03.2006] Available at <http://www.sairr.org.za/wsc/pstory.htm?storyID=231>

The Equality Court's jurisprudence shows that some of these inter-relational problems are also infringement of equality rights.

One might believe that the involvement of state action constituting infringement of the prohibitions in section 2 of the Equality Act would be a common allegation brought to the Equality Court. No such cases were seen among the collection of cases, which may indicate that the primary conflicts being solved by the Equality Court are first of all disputes between private parties. This picture was confirmed by the Court clerk.

5 Access to process

5.1 Characteristics of the parties

A Swazi woman brought her case to the Equality Court, as she wanted a man to stop following and intimidating her. She alleged that he “followed her wherever she goes”, that he claimed she was his daughter and that he had “taken all her things”. She was now tired of this, as she and her son did not live any “normal” life anymore. She wanted an order and compensation for the pain she was caused. The woman got an interim order whereas the man was to restrain from interfering, intimidating and harassing the complainant, as well as to cease all conduct that would demean or humiliate her. As the man was asked to respond on the allegations, he wanted to know how she could be his daughter, as she was a Swazi woman, and he was a South African. Furthermore, he couldn’t understand what “things” he allegedly should have taken from her; the woman was living on the street and did not have any property.⁸²

5.1.1 Socio-economic background

The case of the *Swazi woman* does not state the factual circumstances about where the complainant actually lived. Assuming that the woman *is living on the street*; the case demonstrates that approaching the Equality Courts is not a resource only available to the employed, people with a safe income and property. Another complaint confirming this is brought by a woman living in a “hostel”.⁸³ It is obvious that these complainants do not have enough income to obtain individual addresses.

⁸² Case 19/05: the *Swazi woman*.

⁸³ Case 13/2005 (*Aids skeleton*). See section 6.1.1.

Other persons approaching the court are living in self-owned property, either of informal or formal addresses. The various backgrounds of the complainants indicate that not only persons with education have an awareness of the substantive right to equality. It is often found that a relatively small group of people know about the enforcement mechanism of achieving rights. Contrary to this, awareness about the Equality Courts seems to be found in different structures and communities. This shows at first glance a positive demonstration of accessibility of the court, as awareness is a necessary pre-condition of approaching courts.

5.1.2 Nationality/ethnicity

The case of the *Swazi woman* demonstrates furthermore that not only South African citizens are represented in the picture of the users. The right to equality is a constitutional protection which one would believe in enforcement primarily applies to South African citizens as a “Bill of Right”. The picture of practice in Durban Equality Court is however that accessibility for all, regardless of nationality seems to be a core basic value.

One may believe that the main conflicts regarding discrimination, hate speech and harassment would appear between black and white citizens in a post-colonial and, post-apartheid state as South Africa.

The form of complaint does not encourage making any reference to racial background; nevertheless names or other information found in the cases indicate a variety of origins. The cases show that South Africans with all ethnic origins have a need of protection against various forms of unfair discrimination, harassment and hate speech. The tendency is that accessibility to the court does not depend of a link to one specific group or another.

However, there is a majority of other backgrounds than white among the complainants. A number of cases clearly show Zulu origin. This is a further positive demonstration that the Equality Court is accessible to those who previously were denied access to courts.

Although blacks and whites, coloured and Indians bring their cases to the Court, the spectrum of complainants is much wider. The parties represent different national, religious, cultural, ethnical and linguistic background.

5.1.3 Age

In Durban last year, the case about the “Nose stud” was particularly highlighted in the media.⁸⁴ The complaint was brought by a 16 year old school girl of Indian origin, who claimed the school to unfairly discriminate her when not allowing the wearing of a nose-stud. She alleged that the wearing of the stud was part of a religious expression in her Hindu belief.

*The two sisters were fighting; one of them was called “a witch spreading aids” by the other. She meant her sister was a prostitute, convinced that her sister’s boyfriend had aids, thus spread rumors about this. She couldn’t understand why she should go to school, “-when she anyway would die soon!?”*⁸⁵

More cases confirm what the case of the “Nose-stud” and *Two sisters fighting* demonstrate; that quite *young people*, in school-age, also may approach the Equality court. This is strengthening the accessibility of the court.

5.1.4 Linguistic characteristics

The complaints filed in Durban Equality Court are written both in English and isiZulu. Some complaints which were brought in English were quite difficult to understand, which demonstrates a low knowledge of English skills. The language used illustrates that a

⁸⁴ See for example: Broughton, Tanya. (03.10.2005). *School faces tough decisions over nose stud ruling*. In: The Mercury. [Cited 16.04.2006] Available at: <http://www.themercury.co.za/index.php?fSectionId=283&fArticleId=2900444>

⁸⁵ Case 28/2005: *Two sisters fighting*.

number of the complainants were of Zulu origin. One must assume that people with other South African origins, such as Xhosa, Venda, Swati and more will appear more often in Equality Courts elsewhere in South Africa.

The low degree of English skills in combination with files written in isiZulu demonstrates that skills in English are not required in order to hand in a complaint. This feature is strengthening the accessibility of the court.

5.1.5 Gender

An interesting feature in the files from the court is the appearance of conflicting fights particularly between women. Both genders are well represented as respectively complainant and respondents, but it seems that more of the complainants are women. One may wonder *why* conflicts are brought to the Equality Court particularly by women, but in any case does it show strength when recognizing that women often have had less accessibility to the courts.

The overall impression is that a variety of people are represented. This indicates that the court is open and accessible to the people who need the protection made available through the Equality Act. The Equality Courts thus has strength in being accessible regardless of age, economics, and ethnic backgrounds. It furthermore shows that procedural barriers are diminishing, letting informalities take their place so that the court may be accessible regardless of certain background or skills.

5.2 Institutional access

5.2.1 Knowledge

The Equality Courts and among others the South African Human Rights Commission (SAHCR) and the Department of Justice and Constitutional Development (DOJCD) have been criticized for not doing enough to raise awareness of the courts function. In a survey conducted by Institute for Democracy in South Africa (IDASA) the survey concludes that

there are very few cases brought before the Equality Courts.⁸⁶ In Durban Equality Court, the number of cases has been increasing from 19 in 2003⁸⁷, to 49 in 2004⁸⁸ and 88 in 2005⁸⁹. The investigation by IDASA is based on interviews with magistrates, registrars, court coordinators and officials who believe that the low numbers of cases derive from lack of public awareness of the courts. The majority of the courts which participated in the survey had not advertised or made adequate efforts to inform the community about the function and the role of the court.⁹⁰

The picture is therefore not unequivocal. An awareness of the Equality Court is the first requirement in order to establish an access to justice. When those initiatives performed seem to be concentrated on urban areas, one may assume that the awareness is very low in more rural areas, where discrimination often occurs.⁹¹

An official in an Equality Court expressed the challenges due to awareness as this;

“In rural areas, people still believe that matters are taken to traditional leaders. I think we need to have an awareness campaign, which will teach our people as to how an equality court can help them. Awareness is necessary so that more cases will come in”.⁹²

As a reference, community courts, also called “peoples courts” are normally well known because they take place in the communities: the judges are elected from the local people, who know the problems of the community, and know the people living there. Furthermore the participation of the people is featured. The features of a community court make

⁸⁶ IDASA. (22.06.2005). *Equality Courts: A report by PIM-SA at Idasa*. [Viewed 23.02.2006] p. 11.

Available at: www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1352

⁸⁷ Newman, Latoya. (26.08.2005). *Raise awareness of the equality courts*. In: The Mercury [Cited 29.03.2006] Available at <http://www.themercury.co.za/index.php?fSectionId=283&fArticleId=2852415>

⁸⁸ Ibid.

⁸⁹ Confirmed by equality clerk.

⁹⁰ IDASA (2005:11).

⁹¹ Newman (26.08.2005).

⁹² IDASA (2005:11).

“awareness campaigns” unnecessary, because people already know about the establishment through their families and neighbours.⁹³

The distance between people living in communities and the official courts seems therefore to be hindering the access to the Equality Courts. As people in more rural areas are used to bring matters to traditional leaders, the prospect of bringing a complaint to an official court will not succeed unless making people aware of the option. As the efforts to increase knowledge are not provided, this illustrates a weakness in the accessibility of the Equality Courts.

5.2.2 Location of the court

Equality Court is every High Court or designated magistrate’s court;⁹⁴ hence the establishment often take place in the same locations. The Equality Court and judiciaries in Durban are located along a trafficked street between a stadium and a popular part of the Durban beaches. The public may quite easily *know* about the allocation of courts in these buildings.

Proponents of informal courts nevertheless utter that the closer the people are to the place where the establishment is, the easier it will be for people to make use of it.⁹⁵ Although the buildings are situated in a central area, one has to recognise that the distance; for instance it is far to the market. Many people are familiar with the market in Durban, where people easily gather when arriving in the city centre. The street with the court buildings is on the contrary most easily accessible by car, and is not an area which people normally make daily use of. The physical accessibility of the court is therefore quite distanced from where people are, which establishes some weakness in this assessment.

⁹³ Sachs and Welch (1990:45-46).

⁹⁴ See section 2.3.1.

⁹⁵ Gundersen (1992:262).

The buildings are furthermore enormous and require a security check, which may create a mental barrier for the prospective users of the court. In addition, there are no Equality Courts in informal settings outside the city centre. Durban, with its approx. three million people will not be served by *one* Equality Court in the city centre. It is hard to believe that people living in more rural areas, with challenges regarding transport etc. will approach the court as users. One may therefore say that the Equality Court in Durban show some weakness in regard of accessibility, here due to its location.

In contrast to the accessibility from outside the buildings, the *inner space* had an open and welcoming atmosphere. The office had little space; was crowded and hectic; yet officials were friendly and showed helpful consideration. They demonstrated a welcoming attitude to their users. People were waiting for their turn, some were relaxing, some were filling out forms, and others were talking to officials. The officials were engaged in talks with different people: was complainants, magistrates, lawyers, reporters etc. The welcoming attitude enables the users to easily find out how they may hand in a complaint, someone to ask for help and to be assisted. The overall impression is that the offices and the officials are very easily accessible once inside the building. It is therefore fair to conclude that the officials have succeeded in providing an accessible court due to a social parameter of location.

5.2.3 The initiation of a complaint

The forms oblige the complainant to give his or hers particulars, including particulars which may assist the presiding officer to make a decision regarding the forum which must deal with the complaint.⁹⁶ Relevant information in this regard may be financial position, availability of transport, social economic status, etc.⁹⁷ Particulars of the respondent must be confirmed as well.

⁹⁶ See appendix C.

⁹⁷ See section 2.3.2.

When initiating the particulars of a complaint, the *nature* of the complaint must be described in detail, in which the date of the incident, the right which allegedly has been violated, the complainants view on *why* this right has been infringed and the particulars of possible witnesses must be confirmed. The complainant is furthermore asked *how* he or she felt at the time of the incident and how the occasion(s) has influenced his or her daily life afterwards.⁹⁸

There are no legal or custom rules of how to state the description forth. The nature of the incident may therefore be described in a personal manner. As an example, case number 30/2005 illustrates how the complainant described the nature of his case:

“On 7th April 2005 I went to my curtain maker Mr. Mahomed who has a premise on the ground floor of the building where the respondent resides. I parked my car outside Mr. Mahomed's premises to unload the curtains from the boot. The respondent who arrived before me, and is unknown demonstrated with me to move my vehicle. On failing to do so he said: ‘You think you can park where you like in an Indian area – you fucking bastard, move your car’.”

The easy language used in the forms does not require any judicial understanding in order to approach the court. This establishes an open attitude which invites persons to tell their story. As a result one may receive more complaints. This is a strong point in favour of the accessibility of the court, as it includes various types of complaints in addition to broader information which assists the further prospect of the case.

⁹⁸ See appendix C.

5.2.4 The role of the equality clerk

As previous elaborated, the officials in Durban Equality Court showed a welcoming and helping attitude to the users of the court.⁹⁹ The equality clerk was the main figure in the administration. He had extensive responsibility for the administration in court, involving the assistance of complainants and contributing with information.¹⁰⁰ Observing him interacting with different people- both complainants in need of assistance as well as representatives, reporters etc. - he was seen to be very friendly, relaxed and casual. He was sometimes observed as an informant, exchanging information between the parties.

In “people’s tribunals” judges and administrators are elected among the public inter alia to secure the public’s trust in justice.¹⁰¹ As a consequence of this, one may say that the court is socially *legitimate* to the people it serves.¹⁰² This does not mean that an election carried out in conformity with other rules leads to an illegitimate court. The western tradition is legitimately based on selection of judges through employment; conditional on formal education and requirements.

A trust of justice may furthermore be sustained or counteracted by the performance and credibility of the officials in the court. Inter alia during apartheid laws in South Africa, the judges were officially and legitimately selected on legal conditions, yet their credibility and enforcement of laws did not sustain justice.¹⁰³

The performance of the Court clerk showed a high degree of credibility and awareness of the difficulties of accessibility by complainants with need of assistance. As the clerk first of all showed a friendly appearance, this overcomes one of the first barriers to persons who

⁹⁹ See section 5.2.2.

¹⁰⁰ See section 2.2.2.

¹⁰¹ Sachs and Welch (1990:46-48).

¹⁰² Legitimacy is an ambiguous concept to define, whereas it can be given a variety of meanings. Here, social legitimacy addresses *public acceptance* of practices and actions of a certain institution.

¹⁰³ More on this, see Dlamini (1987).

are unfamiliar with the courts system; it makes it easier for people to bring forward their claims.

The objective fact that the clerk is a black South African may give a feeling of “being equal” to other black South Africans. South Africans have a long tradition of meeting only whites in public offices, - in addition to a court system which has been carrying out oppressive rules. To meet a black official may therefore give the impression that justice is secured in this court. The clerk was not seen acting differently to other than blacks, which confirms his professional behaviour and integrity. So far, it is possible to conclude that the equality clerk showed a high degree of credibility, thus objectively legitimizing and justifying the court.

Case number 39/2005 illustrates that the clerk may bring a conflict to an end before there is any hearing in the court. The dispute was between a girlfriend and an ex-girlfriend of a man. They were calling each other “names” and were very upset with each other. The case brought no hearing in court, as the Court clerk had been talking to them and simply asked them to stay away from each other. The present girlfriend was instructed not to answer the phone when the ex-girlfriend called the man on his phone.

The clerk’s conduct in the administration showed a genuine interest in engaging with matters so they can be solved rapidly and considerately. The actions in this case contributed on the one hand to an easy accessibility of process. On the other hand, informalism seems to play a greater role compared to proceedings of other courts. This case, which isn’t based on an infringement of a legal right, would probably rapidly be refused by other courts. Alternatively it would be refused when asking a legal representative to take care of it. As part of the system practiced in Durban Equality Court, the non-legal and “everyday” nature of the matter does not automatically mean that the case is rejected. The clerk took care of it, and tried to help the individuals concerned.

Among the people served by the court, the sense of integrity and a feeling of justice will increase when people are being treated individually, sincerely and with respect for their private spheres. Even complaints of a non-legal character may get the same attention as the complaints of a legal character, as the formality decreases. As seen practiced, it is possible to conclude that the work of officials is crucial in a court and here is sustaining accessibility and justification to the people it serves.

5.3 The Equality Courts' approach to litigation

5.3.1 Hearing in court. Characteristics

Observations from a “directions hearing”¹⁰⁴ in the Equality Court in Durban may be valuable to highlight some of the important aspects in the functioning of the court.

The court was set for directions hearing in case 85/2005 on the 23.11.2005.¹⁰⁵ In the hearing, the complainant, a young female was present without representative. She accused her boss with allegations of discrimination and sexual harassment after being dismissed when refusing to sleep with him. She had been working as a freelance journalist in a newspaper in the Durban area. Accused was also the senior manager, whom she accused of not protecting her as an employer. The two accused were represented with their own respective lawyers.

The parties were gathered around an oblong table and rose as the presiding officer arrived. The magistrate arrived lastly, all sat down as he sat down at head of the table between the two parties. Behind him sat the equality clerk at his own desk. The magistrate showed no visible signs of being a judge, as he wore his own civil clothing. He early stated that this is “no ordinary trial or an ordinary court; this is a meeting”, where the participants were congregated to sort out administrative issues before the trial. No allegations were therefore to be raised in this meeting, nor any evidential matters. He furthermore emphasised that they were gathered in order to find a solution of the conflict, avoiding an increase of hostility between the parties.

¹⁰⁴ See 2.3.2 and 2.3.3.

¹⁰⁵ Hereafter: the *Freelancer*.

The claimant was asked whether she had applied for legal aid and whether she wanted to have a representative in court. He explained to her that there is a constitutional right for everyone to be represented in court, but that it was not automatically that the state would provide for her representative. The claimant refused the possibility of setting up a new date of hearing, so that she would be able to apply for legal aid in the meanwhile. The claimant seemed impatient and obviously wanted to deal with the matter instantly.

The presiding officer intended to hear the story from both parties. As the claimant told her story, as if to the two respondents, the magistrate asked her to direct the story to him and not to her alleged offenders. She told her story in a personal manner, referring to democratic and constitutional principles and was obviously very upset and frustrated. Although she was informed that this was no evidential section, she still referred to reasons for the allegations and why the men should be prosecuted. The magistrate tried to “cool down” the session, interrupting her as she focused mainly on the allegations and its evidences. He tried to explain certain procedural principles to her and asked her furthermore to confirm whether they had understood each other correctly.

As the respondents were asked to respond and tell their side of the story, the lawyer representing the senior manager argued that his client should not be present. He argued that the allegations could not be charged against him, or under responsibility of the newspaper, because the claimant was not employed by the newspaper. In turn, the claimant was asked to respond to this, in which she once more brought evidential matters and told a story with no reference to judicial sources or arguments. It became very obvious that her non-legal background made it difficult for her to understand the procedure in court and the judicial limitations at this stage as well as the limited question. Her performance in court even made the impression that she would have small chances to succeed in court.

The hearing resulted with intervention of the magistrate. He had once more asked the claimant whether she wanted to apply for legal aid, which she refused. Despite this, he ruled that the preliminary hearing now would be interrupted, and a new date would be arranged for the parties to meet. The magistrate wanted the complainant to find a representative and apply for legal aid until then. He explained to her that she would have very small chances to succeed if she did not bring a representative by the next occasion.

5.3.2 Environmental features

Procedural informality has been stressed amongst others in the ideology of popular justice.¹⁰⁶ This does not mean that the procedure is “without forms”. It means that the procedure should not adhere to technicalities but facilitate a less formal approach to law compared to for example traditional Western-style procedure.

As seen practiced in the Equality Court in Durban, the first impression of a move away from formality was expressed through the clothing of the presiding officer. The magistrate wore ordinary clothing, a bright suit which distinguished him explicitly from the appearance of traditional judges wearing a dark gown to demonstrate objectivity. In this setting, his impartiality as a magistrate was confirmed physically as he sat down between the two parties.

One may expect that as a result of this, the psychological barriers to participate during proceedings would be lessened. The magistrate took his place at the same table as the parties, which moderated his role as “honourable judge”. The position between the parties addresses his role as a neutral third party whose role is to facilitate a just process where the parties may participate.¹⁰⁷ The setting reminded of a session of mediation, even more as the presiding officer stated; “this is no ordinary court; this is a meeting”.

The climate in court somehow changed when the parties had sat down and the magistrate commenced his introduction. When a party is unrepresented, as the complainant in the *Freelancer* was, a court session requires that there is openness and an informal setting so that neither lack of judicial skills nor fear may hinder a party to present a case. Access to a just process and a legitimate outcome requires that all possible information is brought to the table. The setting facilitated such features through physical aspects; thus had a potential of providing a fair process.

¹⁰⁶ Gundersen (1992); Sachs and Welch (1990);.Abel (1974); Informal justice (1984)

¹⁰⁷ See section 2.3.3.

5.3.3 Communicative features

The complainant in the *Freelancer* expressed herself in a personal manner, telling her story without perceptions of judicial application. She expressed herself with feelings of what the conducts had caused her. The presiding officer now and then emotionally replied “I understand”, not in a very formal manner, but to show that he understood that her feelings had been hurt according her.

The storytelling approach

According to Bohler, the storytelling approach would assist a wise judge to make a judgment “which takes into consideration the histories and complexities of that particular case and those particular characters”. It furthermore reminds us of the fact that those who seek justice are individuals with their own stories and that these – in order to seek justice, should be heard.¹⁰⁸ Woolman recommends that the storytelling approach should be considered by the courts whereas he suggests that:

“the only way to come to grips with what the comparison of incommensurable goods requires of us is to present stories, detailed stories, about the kind of worlds to which we commit ourselves when we choose certain values and goods over others”.¹⁰⁹

Being emotional in her utterance and free to address the relevant issues according to her view may facilitate a more satisfying and just process for the complainant as well as highlight important facts about the matter. The participation by the parties may thus contribute to the aim of achieving an overall *ideal of justice*.

By allowing narratives to come through, the storytelling approach takes into account the particulars of the individuals, but may at the same time create an uneven balance between the parties as the parties represent different status of power. In the *Freelancer*, the

¹⁰⁸ Bohler, Narnia. *Equality Courts: Introducing the possibility of listening to different voices in South Africa?* In: THRHR Vol. 63 (2000), p.288-294 at p. 290-291.

¹⁰⁹ Wolman, Stuart. *Out of order? Out of balance? The limitation clause of the final Constitution*. SAJHR Vol. 13 (1997), p. 102-134 at p. 103.

complainant moved the focus away from the legal particulars of the matter. For her it was important to utter her emotions and be listened to as a victim of harassment. On the other side of the table, the respondents in the *Freelancer* through their legal representatives told their stories in a strictly legal manner. The focus from their side was on the legal arguments of the matter; hence a “new consolidation” is created in court.

The “new consolidation” consists of two different communicative discourses based on both storytelling *and* legal arguments as approaches to litigation. The discourse based on legal arguments may be characterised by a logically distinct procedure which determines the facts within a particular legal category. The discourse of storytelling is characterised by lack of autonomy, it is close to everyday common sense and moral and political discourse. The latter characteristics are close to those one may find in popular tribunals, which represent an informal and broad approach to law, independent of legal characteristics.¹¹⁰

In this specific case, the combination of the two different discourses creates an uneven balance in which the parties represent incommensurable approaches to the substantive outcome. One has to recognise that the presiding officer must make a decision primarily based on legal premises, in which in this case were only being presented from one side.

The practice in the *Freelancer* case shows that challenges to a fair and *just* hearing appear when there is a consolidation of the two approaches to litigation, in which neither of the parties make use of both. As the magistrate was careful to explaining and guiding the complainant, the relevance of the “storytelling approach” did not become an issue at the other side of the table. The respondents did not tell their stories in their personal manner; they relied fully on the presentation from their legal representatives.

If the presiding officer is intended to make a substantive decision where, according to Bohler, *complexities and history of the case may be taken into account* in order to establish

¹¹⁰ Informal justice (1984:157).

a more just outcome and a more social acceptable solution, the need of a storytelling from the respondent is necessary as well. Only by this may the sitting officer give a ruling which has taken into account all relevant issues in the case, and where the balance of the two discourses is as far as possible evened out.¹¹¹

One may not even know which approach - the storytelling or the approach based on legal premises - may be emphasised by the sitting officer. This may mean a disadvantage for one or both parties, and furthermore leads to an extremely difficult balancing act for the presiding officer, who in this case didn't have the possibility for both values and rights to be presented at the table. The balancing of values, history and complexity from both parties is after all a necessary condition to achieve the ideal of justice in substantive terms.

Thus one may hitherto conclude that the design of the hearing show some weaknesses, as a combination of discourses potentially may create an unfair – and unjust hearing.

5.3.4 The role of the presiding officer

The *Freelancer* resulted in an intervention by the presiding officer. The female applicant remained more silent the more she was “corrected” during the hearing, and expressed on some occasions that she did not clearly understand what the magistrate meant. It was obvious that she had significant difficulties in dealing with and understanding the judicial concepts and principles introduced.

It seems as if there was a transition in the use of language from the stage of initiation of a complaint to the undertaking of hearing in court. The language in the forms was easily understandable, which demonstrated a positive aspect of the courts' accessibility.¹¹² In the case of the *Freelancer*, the hearing started in an informal and open manner yet later changed to a language seemingly characterised by a legal nature.

¹¹¹ Yet one has to recognise the constitutional right of being represented legally in court, which a “story-telling” requirement could have infringed.

¹¹² See section 5.2.3

The language used thus demonstrates a barrier to participation for an unrepresented party. The procedure may therefore result in unfairness.

The magistrate had tried to assist the claimant through explanations of constitutional rights and the procedural rules for the pre-hearing etc. It is submitted that such informative proceedings may indicate a more inquisitorial nature, as information, guiding and investigation are required in order to find the material truth.¹¹³ The informative principle combined with the investigating features hence leads the design of the Equality Courts' litigation away from the traditional adversarial nature.¹¹⁴

It is evident that the magistrate's approach to the informative and guiding role relieved to some extent the lack of judicial background of the complainant and thus evened out some of the imbalance between the parties. His intervention in any case clearly brought an end to the prospects of an unfair and unjust process. Even if the complainant did not want to have a legal representative in the first place, she received a possibility to reconsider her choice. One may therefore say that the intervention of the magistrate therefore replaced the prospects of an unfair process with a new vision of justice.

The power of the sitting officer therefore may be a guarantee that unfair processes do not take place in the Equality Courts. His power, and features of information and investigation may even out an imbalance between the parties, in which both the access to courts through participation by the parties and access to a just and fair process may be featured.

¹¹³ Abrahams, Geoff. *The application of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) in the magistrate's court: an examination of selected innovative aspects*. (University of South Africa 2004), p. 9-11.

¹¹⁴ See section 2.3.3.

6 Access to outcome

To assess the outcome of the process this section focuses on the court's use of remedies. The most common remedies applied are "unconditional apology", different interim orders and "payment of damages".¹¹⁵

6.1 Direct consequences of the remedies applied

6.1.1 Prevention of discrimination

The case of the *Aids skeleton*¹¹⁶ illustrates the court's use of interim orders.

The applicant was living in a hostel, where a room mate had started to hit and use a "bush knife" on her, threatening to kill her because she allegedly was an "aids skeleton". The room mate had further destroyed and stolen her property; amongst other her keys, - because the respondent wanted the complainant to move out.

In this case, the ruling of an interim order required that:

"1) the respondent is restrained from in any manner interfering, intimidating and harassing the complainant. 2) The respondent is to cease all conduct that demeans or humiliates the complainant or creates a hostile or intimidating environment. 3) The respondent is warned to make any reference to the health status of the complainant or to any other party. 4) The respondent is ordered not to injure the complainant in her person or property in any manner. Failure to comply with the order will result in a criminal charge as contemplated in section 21(2) of the Equality Act, in addition to any other relief set out in section 21 thereof."

¹¹⁵ Interim orders are normally given at an early stage of the matter, with an intention of being relieved at a later stage.

¹¹⁶ Case 13/2005.

The interim order clearly seeks to protect the claimant from further infringement of rights.

The application of an order which is to be enforced between the parties seeks to regulate the dynamics between the parties.¹¹⁷ The claimant was afraid to sleep in the same room as the respondent, it would therefore be important for her to be safe from fear of threats to be killed with a bush knife. She needed a protection of her property, - which is promoted through the prohibition of injury. The focus is thus on the victim who *needs* protection against further infringement of equality rights which may be seen as an attempt of doing *individual justice*.¹¹⁸

The prohibition of interfering, intimidating and harassing the complainant clearly addresses protection from harassment. Furthermore, the protection from hate speech is envisaged through the warning of reference to the complainant's health status. One may accordingly understand the restraining order from the court as a prevention of discrimination, as it addresses how protection of equality should be enforced.

6.1.2 Promotion of equality

The disputes settled by Durban Equality Court show that “unconditional apology” is the most common remedy sought – and applied.¹¹⁹ Cases which have resulted in a restraining order, as the above mentioned case of *Aids skeleton* also often involve the additional settlement of an apology.

¹¹⁷ *Punishment, Restorative Justice and the Morality of Law*. Eds. Erik Claes, René Foqué, Tony Peters. (Antwerp-Oxford 2005) p. 106-109.

¹¹⁸ Massaro, Toni M. *Empathy, legal story telling and the rule of law: New Words, Old Wounds?* In: Michigan Law Review. (1988-1989) p. 2099-2127 at p. 2116, is stating a call for more empathy in legal decision-making which includes the call for more *individualized* justice: “Judges should focus more on the context – the results in *this* case to *these* parties – and less on formal rationality – squaring this with results in other cases. This means that the law must be more open-ended...”

¹¹⁹ See cases number 13/2005; 16/2005; 26/2005; 28/2005; 30/2005; 31/2005; 33/2005; 37/2005

The ruling of apology appears to be made with an intention of *promoting* equality both at an individual and a societal level. Settlements of apology seek to educate people in how they may solve similar conflicts in daily life, both between the individuals concerned in one dispute and in the society in general.¹²⁰ The South African experience clearly shows that racism polarizes the society instead of unifying it. The Equality Courts thus demonstrates that hate speech, harassment and discrimination are not acceptable in a democratic society. Through settlements of apology it appears that the Equality Courts seeks to unify the society through promotion of equality rights.

The case of the *Whites-only barber shop* which has been highlighted several times in media in South Africa, illustrates another means of promoting equality.¹²¹ The incident took place as South African Human Rights Commission Chairman Jody Kollapen was refused a haircut in a Pretoria barber shop. The owner of the salon had said that “neither he nor his staff were trained to cut ‘coloured people’s hair, because it is different to that of whites”. More complainants had handed in their complaints to SAHRC regarding the same barber. The barber and his staff were in court ordered to “undergo training to cut hair characterized as ‘indigenous’ or ‘ethnic’ by Pretoria’s Equality Court after he admitted to a policy of turning people of colour away from his salon”.¹²²

The remedy appears therefore to be a *future-oriented* application of remedy. This illustrates another function of the Equality Courts as a promoter of equality.

Proactive interventions have been submitted as necessary in order to eradicate “conditions that lead to unfair discriminatory practices.”¹²³ Through an order of undertaking training, the measure may be understood as the court seeks to intervene in a *proactive* way to hinder new discriminatory practices. Craig in his PhD about systemic discrimination in

¹²⁰ Introduction (2001:30).

¹²¹ Venter, Bruce. (30.03.2005). *A clear-cut issue of discrimination: Kollapen*. In: The Mercury. [Cited 01.04.06] Available at <http://www.themercury.co.za/index.php?fSectionId=283&fArticleId=2462959>

¹²² Ibid.

¹²³ Gutto (2001:205).

employment sector emphasizes some advantages (and characteristics) of proactive measures to prevent discrimination. He refers amongst others to the ongoing nature of the obligation, the organization-wide impact and the prevention of new incidents of discrimination.¹²⁴

Comparing the remedy of “undertaking training” in this case with the advantages submitted: “undertaking training” may function as a proactive way of *preventing new incidents* of discrimination, particularly addressed to those of systemic nature. Both customers of the salon of the barber-shop and other hairdressers’ salons are benefited through such measure. The remedy goes therefore beyond an *immediate* benefit to the individual complainant. The intention is to educate and promote equality among the staff of the barber-shop and impacting other hairdressers, with a look to the *organization-wide impact*.

This case thus illustrates the potential for the Equality Courts to function as a promoter of equality by proactive means as a response to systemic practices of discrimination.

6.2 What kind of justice do the remedies sustain?

6.2.1 Retributive justice?

Whether the case of the *Aids skeleton* was brought to the criminal courts is not known. An institution of criminal prosecution is not under the Equality Courts authority. The interim order warns, however; “failure to comply will result in a criminal charge”.

Yet in this case; power is used to influence the behaviour of the respondent by forcing the respondent to make choices according to the will of the Equality Courts’ authority. In accordance with the intention behind the Equality Act; Durban Equality Court seeks to

¹²⁴ Craig, Ronald. *Systemic Discrimination in Employment and the Promotion of Ethnic Equality*. (Oslo 2005), p. 322-323.

educate the offender instead of sentencing him.¹²⁵ In the interim order endorsed, the offender is therefore given a choice of complying or to be taken to the criminal court.

Although the incident clearly shows criminal conduct, the court seeks to reconcile the parties. One may therefore say that the Equality Court tries to strike a balance between individual justice and social justice.

Payment of damages is another form of punitive sanctions which seeks to change behaviour.¹²⁶

The cases from Durban Equality Court shows that payment of damages has only been ordered in two matters and the amounts do not extend to more than 2000 Rand. Monetary amounts are a relative consideration in South Africa. Taken into account that the respondents in the respective cases were a guesthouse owner and an estate agent one may assume that 2000 Rand is a relatively small amount of money. It seems therefore that fines are not intended to function as retributive sanction, or at least only play a minor role as retribution to the prohibited conduct.

The additional remedy of paying 10 000 Rand to a charity of the complainant's choice in the *Barbershop* case must in contrast be said to clearly intend more than a "payment of damages". A fine of 10 000 Rand would constitute an order which is felt as a punishment by the offender concerned. However, the ruling of payment to a charity draws the focus away from the case of the individual complainant. It seems as the Equality Court centers on the possibility of promoting and educating equality rights. This case suggests an opportunity to promote equality in a wider sense by ordering payment to a charitable organization.

The use of punitive measures illustrates how the courts seek to balance individual and social justice. The sanctions are used as a means of changing social structures of inequality, more than retribution as a response to the conduct.

¹²⁵ Equality Act section 21(2); Bench Book (2001:139); see section 2.3.4.

¹²⁶ Introduction (2001:28-29).

6.2.2 Reparative justice?

Reparative justice may be perceived in symbolic terms, as monetary compensation or other redress.¹²⁷

The cases from the Equality Court in Durban show very little use of reparations in the form of monetary orders, yet in two cases as “payment of damages” or “payment of charges”.

In for instance the *Morningside B&B*,¹²⁸ the respondent was ordered to pay 1000 Rand for damages that she had caused.

The *Morningside B&B* is the case of an employer at a guesthouse in Durban who was angry at her worker and in anger took a stapler and punched paper at her, called her a “kaffir”¹²⁹ and said that she “could go away”. She “squeezed her neck”, all because she wanted to “teach her worker to keep promises”. The complainant felt embarrassed and therefore left the job.

The monetary order was in this case seemingly with view to the payment of caused damages. Without knowing the exact circumstances, the small monetary award may to some extent restitute lost income after the applicant left the job. It seems however additionally to function as a “compensation” for the damages caused, with regard to physical and psychological effects of the assault.

Zalaquett believes that reparations are very important because it indicates an acknowledgement of the victims’ dignity. Yet he furthermore suggests that monetary reparations “must be made in such a manner that people do not receive them as an entitlement, payment or trade-off.”¹³⁰

¹²⁷ Asmal (2000:16).

¹²⁸ See case 37/2005.

¹²⁹ “Kaffir” is a derogatory term for an African.

¹³⁰ *Dealing with the past: Truth and Reconciliation in South Africa*. Eds. Alex Boraine, Janet Levy and Ronel Sheffel. 2.ed. (Cape Town 1997), p. 13.

A small monetary award as in this case seems to facilitate an acknowledgement of the victim's dignity, thus may hardly be understood as a payment or trade off. Moreover one may say that this is understood as an application of remedy aiming to achieve reparative justice. Through the award of some compensation, a symbolic recognition of the victim's dignity is visible. This balances the educative aims with individual justice.

6.2.3 Restorative justice?

Promoters of restorative justice emphasize the needs of the victims as well as ensuring that the offender is aware of the damage which has been caused and of their liability to repair that damage. Standard criminal trials normally deny such aims, which can only be achieved through a face-to-face meeting between the victim and offender in a safe setting which promotes dialogue and an acceptable solution. Hindrance of a repeat of the incident as well as reconciling the offender with the victim and the community is sought.¹³¹

Many complainants describe psychological reactions deriving from the incidents of legal infringements. Reactions such as loss of dignity, humiliation, insult, anger, frustration, nervousness, fright and anxiety are mentioned frequently as consequences of the incidents. As an example, a complainant felt deeply humiliated in front of her neighbours and was now "suffering from nervous breakdowns" wherein she finds it difficult to sleep at night. Her neighbour had called her "bad luck" because of a disability she has, and that God did not love her because of that.¹³²

These cases illustrate why the complainants bring their problems to the Equality Court. Many complaints are brought to the court not only because of a legal infringement, but also because of a need to deal with the personal consequences of the conduct.

Apology as remedy has been introduced in the Equality Act of at least two reasons. Firstly, because the prohibited conducts in the Equality Act may offend a person's or group's

¹³¹ Johnstone, Gerry. *Restorative Justice: Ideas, Values, Debates*. (UK 2002) p. 1-3.

¹³² Case 33/2005.

dignity, thus an apology may heal that violation. The second reason is that it may be educational in a personal and public sense.¹³³

An apology addresses the restoration of the vanished dignity of the victim of discrimination. As seen in Durban Equality Court, an apology is either ruled alone or in combination with a monetary compensation. This may be seen as an intention to acknowledge the victim's pain and the personal need of dealing with the violation.

In combination with the procedure, which intends to be informal and participatory for the parties, an apology may contribute to reconciliation between the parties. The sought objective may as such be understood as a deviation in regard of the retribution of the offender's conduct, as the emphasis seems to be on the individual conflict and the prospects for reconciliation more than the violation against criminal law and retributive justice.¹³⁴

As a form of social education, people in conflict may learn that behavior of hate speech, harassment and unfair discrimination is not acceptable in a society based on democratic values. This is in line with the promotional function of the Equality Courts. Where the media refer to the Equality Courts, highlighting the content of hate speech and remedies available to the courts, the courts may function as an educator also in a broader sense. This declares an authority and power of the substantive right to equality. The long-term prospects of the Equality Courts may accordingly be envisaged as a *reconstruction of norms* in South Africa.

Thus far one may conclude that the Equality Court's jurisprudence clearly emphasizes the aim of *restorative justice*.

¹³³ Introduction (2001:30).

¹³⁴ Punishment (2005:80-85).

Stealing a conflict?

Aiming to restore moral norms among people through the Equality Courts' jurisprudence, and the courts' involvement in personal matters implies the transformation of the dispute from personal to one which is considered primarily legal. Christie alleges that the choice of setting in a court building, led by an officer with a power and authority to intervene, litigation possibly led by legal representatives and the legal determination of rights increases the prospect of "stealing" the conflict from the environment where it originally belongs. The dispute may become a "property" of the legal system, instead of a relational and social conflict.¹³⁵

This dilemma is illustrated in the case of *Morningside B&B*.¹³⁶ The Guesthouse owner had called her employee a "kaffir", which is a deeply humiliating name for an African. This in the first place represents a breach of trust in a relationship, which needs to be dealt with of personal and social reasons. Normally one would address these issues to the hostile parties, with no intervention of a legal institution. The intervention of a court may therefore hinder the parties from dealing with such issues themselves.

From this perspective, one may suspect the Equality Courts' assessment of individual conflicts is used as a means of promoting equality rights in the society.

The danger however, is that the individual rights may lose the prospected substantive protection envisaged by the Equality Act. The intention of promoting equality in the society will prefer collective needs to individual needs. A concrete example would be the case of *Morningside B&B*, where one may wonder if the practice of assault and discriminatory actions by the employer will cease after apologizing and paying 1000 Rand in compensation.

¹³⁵ Christie, Nils. *Konflikt som eiendom*. In: TfR. Vol. 89 (1997), p. 113-132.

¹³⁶ Case 37/2005, see section 6.2.2.

This illustrates how the Equality Act on the one hand envisages a strong protection of equality rights. Yet on the other; the acknowledgement of such infringement in many cases does not extend further than an apology and maybe some symbolic compensation.

One may therefore ask; *for whom* is reconciliation sought? Is an apology appropriate means of substantive equality for the individual? Is the settlement of apology being used as a *means to educate the public* about the norm of non-discrimination? Is the courts' balancing between individual and social justice justifiable from the individual victim's perspective? To answer these questions there is a need for an extended case study in order to explore practical influence and satisfaction among individuals and communities concerned.

The route of the Truth and Reconciliation Commission

The process of the Truth and Reconciliation Commission (TRC) which took place in South Africa in its early transition to democracy stressed the importance of giving everyone a chance to tell their stories of what the apartheid regime had caused them.¹³⁷ The aim was not to bring justice on a legal level. There was no power for prosecution, and the evidence found could not be used for later prosecution. The TRC could make *unbinding* recommendations of what should be implemented in order to repair the damages of the past.¹³⁸ Aiming to heal the wounds of the victims by disclosing the truth and providing restorative justice through acknowledgement of years under oppression was crucial. It was believed that only through different processes would a systematic dealing with past atrocities lead to a moral reconstruction and social repair.¹³⁹

¹³⁷ 1995-2001.

¹³⁸ Wilson (2001:16).

¹³⁹ Dealing with the past (1997:8-14). More on social repair: see Fletcher, Laurel E. *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*. Laurel E. Fletcher and Harvey M. Weinstein. In: Human Rights Quarterly Vol. 24 (2002), p. 573-639. Op. cit. p. 625 it is submitted that following interventions are critical components of attempting social repair: "(1) state-level interventions; (2) criminal trials (national or international); (3) commissions of historical record (truth commissions); (4) individual and/or family phycho-social support; (5) externally-driven community interventions; and (6) community-based responses".

The process of the TRC in South Africa has been criticized by Wilson, who alleges that the open hearings achieved restoration limited to the social relationships between the *victims*. Reconciliation between victims and perpetrators required more contact between the parties than TRC was able to provide.¹⁴⁰ According to Wilson, the TRC commissioners asserted that “all pain was equal, regardless of class or racial categorization or religious or political affiliation”.¹⁴¹ This means that the suffering is not considered with a view for the individual context and how the suffering has influenced the victim.

Furthermore, he cites anthropologists Merry, Conley and O’Barr stating that;

“people become involved in legal processes for a variety of reasons which may be very distinct from what the law itself thinks it is doing. Their involvement does not necessarily mean a deep loyalty or affinity to nation-building or a new language of rights.”¹⁴²

Comparing the intended restorative process of the Equality Courts with the critics of the TRC one may perceive some weaknesses in access to outcome for the individuals in terms of restorative justice through the Equality Courts.

Firstly, the proceedings in the Equality Courts may create a too great a distance between the complainant and the respondent in order to achieve reconciliation (and thus restorative justice) on the individual level. The procedure intends to be “participatory”, yet does not facilitate a communication between the parties. The hearing is facilitated by the presiding officer, to whom *inter alia* in the case of the *Freelancer* the parties directed their contribution as an objective third part, but failed to talk to *each other*. Neither have the parties the opportunity to talk freely when one is represented by a legal representative.

¹⁴⁰ Wilson (2001:142-155 at p. 155).

¹⁴¹ Wilson (2001:111-112).

¹⁴² Ibid. p. 142-143, citing Merry, Conley and O’Barr.

Secondly, there is a danger that the individual suffering may be equalized. Durban Equality Court's jurisprudence demonstrates some sort of "mechanical application" of apology as means of settlement. This seems to be a means wherein restoration at a national level through education and promotion of equality rights intends to be achieved.

With reference to the anthropological view, not everyone has a loyalty to the intention of nation-building. An offender may therefore not have an intention of apologizing in order to achieve reconciliation. In such occasion, an order of apology is not adjusted to the individual parties and hence, there is a danger of equalizing the suffering of every complainant. From a victim's perspective this will not be justifiable, as the suffering and context is distinct in every matter.

The danger of applying remedies which first of all intends the *promotion of equality* and restoration of *the nation* seem therefore to be prominent. This means that the *collective* is preferred to the *individual* protection of equality rights and accordingly hardly justifiable to the parties.

7 Concluding remarks

This analysis has provided important findings about the Equality Courts' justification and appropriateness in a socio-legal perspective. One must however recognize the limits of this field work, emphasized in the introduction.

The study illustrates that despite weaknesses in the physical accessibility and promotion of the courts, various people who earlier were denied legal services now have access to the court. Therefore one may conclude that the Equality Courts' complaint-based model is informal and easily understandable in the preliminary stages, thus may be justifiable and appropriate to the people it serves.

The study of the pre-hearing illustrates that accessibility to a fair process providing legal protection is challenged by various factors. The most prominent challenge to a fair process might be the combination of discourses which created significant challenges in the observed hearing. Despite an extensive authority to inform and investigate the matter, the presiding officer faced a difficult task of guiding the litigation. The case showed however, that fair process was guaranteed through the intervention made by the officer.

One may wonder how the process would have developed in a case with more equal parties who approached litigation on more equal terms. The flexibility in the procedure shows the potential for creating a new culture of litigation, where the process may be better adjusted to the parties wherein it facilitates accessibility, informality, flexibility, participation *and* fairness guarantees. The breach with the legalistic approach to justice is accordingly visible. This facilitates a court which operates in compliance with an ideal of substantive justice. A more just and appropriate procedure - creates a "better law" in substance.

Making an impact on the moral reconstruction on a national level is pointed out as one of the main targets for the Equality Courts. The emphasis in practice seems to centre on the *promotion* of equality rights, and through this to achieve reconciliation and restorative justice. The field work however, does not encompass empirical data about the courts' practical influence over time on reconciliation and promotion of equality rights nationwide. This remains therefore unanswered.

One may on the basis of the study nevertheless conclude that there are some weaknesses in the court's practice regarding striking the balance in the individual outcome. The Equality Court's implementation of remedies may not be fully justified and appropriate to the individuals concerned. This is based on the finding that the collective is preferred before the individual, and may therefore not provide individual justice.

The wide options of applying different remedies seem not to be fully explored in Durban Equality Court, due to the mechanical means of settlement. Without knowing the details, one could carefully suggest a more creative exploration of remedies in inter alia in the case of *Morningside B&B*.¹⁴³ For instance, an undertaking of training in employment administration might facilitate a less discriminatory practice in the guesthouse in the future.

Due to lack of empirical data, it is hard to give a grounded assessment of satisfaction between the parties. Despite this, the hand-written note found in case number 16/2005 is a valuable illustration of how the court already has had success with some:

"Dear Magistrate; Durban court.

I am very sorry for the delay of this letter. Nana and I have solved our problems. Our parents took us to the priest and he solved everything, now me and her are talking to each other. I thank you for your help and time that you wasted for me.

Lots of thanks."

¹⁴³ See sections 6.2.2 and 6.2.3.

The study of the Equality Courts points to the potential of reconciliation both on an individual and societal level over time. The Equality Courts illustrate the early commencement of a new era within the judiciary. One gets the impression that the flexible functioning and fairness guarantees of the Equality Courts may operate in better compliance with an overall ideal of substantive justice. This requires an active and creative application of remedies, so as to not adhere to an institutionalized and mechanical approach to substantive justice. The Equality Courts thus show a prospect of creating a “jurisprudence of transition” in South Africa.¹⁴⁴

¹⁴⁴ Citing Judge Sachs in: *The City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at para. 101 [Cited 20.04.2006] Available at: <http://www.constitutionalcourt.org.za/Archimages/2074.PDF>

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9 Appendix A

The Constitution of the Republic of South Africa: Act 108 of 1996

Preamble

Chapter 1: Founding provisions.

Chapter 2: Bill of Rights.

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10 Appendix B

Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.

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11 Appendix C

Form: Institution of proceedings in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (2001)

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